



# SJR 32 Subcommittee on Medical Liability Insurance Interim Committee

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## 58th Montana Legislature

### SENATE MEMBERS

JOHN COBB  
BRENT CROMLEY  
DUANE GRIMES  
DEBBIE SHEA

### HOUSE MEMBERS

GEORGE GOLIE--Chair  
ROY BROWN  
KATHLEEN GALVIN-HALCRO  
DON ROBERTS

### COMMITTEE STAFF

DAVE BOHYER, Research Analyst  
JOHN MACMASTER, Staff Attorney  
DAWN FIELD, Secretary

# MINUTES

September 22, 2003

State Capitol  
Helena, Montana

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed. Committee tapes are on file in the offices of the Legislative Services Division.

**Exhibits for this meeting are available upon request. Legislative Council policy requires a charge of 15 cents a page for copies of the document.**

### COMMITTEE MEMBERS PRESENT

REP. GEORGE GOLIE, Chair  
SEN. JOHN COBB  
SEN. BRENT CROMLEY  
SEN. DUANE GRIMES  
SEN. DEBBIE SHEA

REP. ROY BROWN  
REP. KATHLEEN GALVIN-HALCRO  
REP. DON ROBERTS

### STAFF PRESENT

DAVE BOHYER, Research Analyst  
JOHN MACMASTER, Staff Attorney  
DAWN FIELD, Secretary

### VISITORS AND AGENDA

Agenda, Attachment #1.  
Visitors' list, Attachment #2.

### COMMITTEE ACTION

- Sen. Grimes was elected to serve as Vice Chair by a unanimous voice vote.
- The Committee adopted the proposed SJR 32 Study Plan prepared by Mr. Bohyer.
- The Committee chose Billings, Montana as the site of its November meeting.

## **CALL TO ORDER AND ROLL CALL**

The meeting was called to order at 9:05 a.m. by Rep. Golie. Rep. Golie welcomed members, staff, and visitors; introductions were made. All members were present (Attachment #3).

## **OVERVIEW OF SJR 32 ISSUES: DAVE BOHYER, LEGISLATIVE SERVICES DIVISION (LSD) RESEARCH DIRECTOR**

Mr. Bohyer presented information gathered from national and statewide sources concerning medical liability insurance issues and listed factors and possible causes that must be considered in determining if, in fact, there is a medical liability insurance crisis in Montana (Exhibit 1). Mr. Bohyer also referred the Committee to the report previously distributed to members, *AN INTRODUCTION TO MEDICAL LIABILITY INSURANCE ISSUES*, which summarized information Mr. Bohyer has reviewed on the medical liability insurance issue (Exhibit 2). Committee members also received the questionnaire Mr. Bohyer asked the stakeholders to focus on in the meeting (Exhibit 3).

## **FACTORS AFFECTING THE COST OF LIABILITY INSURANCE FOR HEALTH CARE FACILITIES AND HEALTH CARE PROVIDERS ASSOCIATED WITH HEALTH CARE FACILITIES**

### **Liability Insurance Regulation**

**Claudia Clifford, Senior Policy Advisor, State Auditor and Insurance Commissioner,** presented detailed state and national data on the medical liability insurance issue (Exhibits 4 - Power Point- and 4A through 4I - attachments to Power Point). The Power Point presentation (Exhibit 4) covered:

- Is There a Crisis?,
- Overview of Market Trends,
- National Data on Malpractice Claims,
- State and National Insurance Data:
  - Montana Med-Mal Market Over 8 Years: 1995-2002 (Exhibit 4A),
  - National business by Insurers Selling Med-Mal in Montana Over 5 Years: 1998-2002 (Exhibit 4B),
  - National Profitability, Investment Income, and Reinsurance Costs Over 5 Years: 1998-2002 (Exhibit 4C),
  - Business of Top 10 Property/Casualty Carriers in Montana Over 5 Years: (Exhibit 4D), and
  - Montana Data on Other Liability Lines (Exhibit 4E).
- Base Rate Information,
- National Association of Insurance Commissioner Data:
  - 1991-2002 Premiums and Losses (Exhibit 4F),
  - Top 20 Writers in 2002 (Exhibit 4F),
  - Mean and Median Premium Written, By State (Exhibit 4F),
  - Terms (Exhibit 4F), and

- Profitability Results - 1991-2002 (Exhibit 4F).
- Number of Agents Appointed to Sell Med-Mal Insurance in Montana,
- Alternatives to Admitted Market,
- Strategy for Affordability:
  - Captive Insurance (Exhibit 4G),
  - Montana Captive Insurance Law and Opportunities (Exhibit 4H), and
  - News Article: Texas Doctors Set Up Captive For Medical-Malpractice in D.C. (Exhibit 4I).
- Data NOT Collected By Department of Insurance (DOI).

Sen. Grimes asked which carriers insure facilities only and if there was any other data available pertaining just to facility medical liability insurance. Ms. Clifford said there was no data available that segregated facility data from provider data because that information is not collected by the DOI but the insurance carriers could be asked to provide that information.

Sen. Cromley asked if there was national data available on the premiums paid by hospitals/clinics and if there was specific data for Montana facilities. Ms. Clifford said she would research this.

**Mari Gray, Property/Casualty Actuary, State Auditor's Office (SAO),** said there is a "cookbook" which lists base rates for facilities and providers but the SAO does not collect data on the bottom line premium that is actually paid.

Sen. Shea noted on page 5 of Exhibit 4, Ms. Clifford said that according to national malpractice claim data, the great majority of patients injured by medical negligence do not file a malpractice claim. Sen. Shea asked how that data was gathered, since there was no claim filed. Ms. Clifford said that information came from a Harvard medical practice study (*Patients, Doctors, Lawyers, and Medical Injuries*) and that she would be able to provide a copy to the Committee. Ms. Clifford said this data was also cited in the GAO Report (*MEDICAL MALPRACTICE: Implications of Rising Premiums on Access to Health Care, August 2003*) (Exhibit 18). Sen. Shea noted on page 5 of Exhibit 4 that of the number of patients that sue and receive compensation, 96% of the claims are settlements and 4% are trial verdicts. Sen. Shea asked Ms. Clifford if she thought there could be an impact on the cost of medical malpractice premiums if more patients opted for trials instead of settlements. Ms. Clifford said that would be a question better suited for the legal experts present and that she did not feel she was qualified to properly answer that question.

Sen. Grimes asked Ms. Clifford if it was the opinion of the SAO that there was a medical liability insurance crisis for Montana facilities. Ms. Clifford said the cost of insurance coverage is a problem for some facilities, that the SAO has been working with several facilities to obtain affordable coverage, and that the SAO is working to establish captive insurance programs for several Montana hospitals. She said she would gather additional facility base rate information for the Committee.

Rep. Galvin-Halcro asked what impact the stock market has had on this issue. Ms. Clifford said the companies are still profitable even though investment earnings have decreased. Rep. Galvin-Halcro asked if the captive insurance opportunity in Montana was easily navigated by those wishing to set up a captive insurance program. Ms. Clifford said the Montana laws were

conducive to attracting insurance captives and the SAO was doing its best to encourage this as an avenue for economic development in Montana.

Sen. Cobb asked how long the process took for a captive to be formed and licensed. Ms. Clifford said an application with complete information can be approved and licensed in 60 days.

Sen. Cobb noted that if historical trends are to be followed, there should be a decrease in premiums over the next year or two and asked Ms. Clifford if that was likely to happen. Ms. Clifford said while she hoped that would be the case, it was very difficult to predict. She said there were indications that there would be increases but they might not be as large as in the past several years. Sen. Cobb said that even with a decrease, affordability would still be a problem for many facilities.

Ms. Clifford directed the Committee to Exhibit 4E and noted there are huge differences in the rate increases between the companies providing medical liability insurance.

Rep. Roberts asked Ms. Clifford if she was concerned about the depth of reserves the captive insurance carriers would have available in case of significant claims. Ms. Clifford said Montana statute provides for reserve standards that must be maintained and each captive is examined financially to make certain they are solvent and able to protect their policy holders.

#### **LIABILITY AND MEDICAL PROVIDERS**

**Dick Brown, Montana Hospital Association (MHA)**, testified to the Committee of the need for this study and the importance of identifying solutions to what the MHA sees as a serious threat to health care in Montana (Exhibit 5). He discussed the following points:

- skyrocketing liability insurance rates,
- the decrease in insurance carriers in Montana,
- problems experienced by hospitals in dealing with carriers,
- litigation issues, and
- the consequences and effects of the above.

Mr. Brown also distributed a fact sheet containing information on the six insurance companies exiting the Montana market (Exhibit 5).

**Jeanne Worsch, Executive Director, Board of Medical Examiners (BME)**, said the BME:

- is charged with protection of the health, safety, and welfare of the public,
- regulates the licensure of physicians/DOs, physician assistants, acupuncturists, nutritionists, emergency medical technicians, and other healthcare professionals,
- is made up of 11 members: 5 physicians, 1 DO, 1 licensed podiatrist, 1 physician assistant, 1 nutritionist, and 2 members from the public,
- meets six times a year and grants 20-100 new licenses each meeting,

Ms. Worsch provided physician oversight information for the years 1993-2003 and detailed information on the duties and statutory responsibilities of the BME (Exhibit 6).

**Pat Melby, Montana Medical Association (MMA)**, stated the MMA does not believe there is an overall crisis in medical malpractice insurance in Montana but that there are several "specialty" practices (neurosurgeons, obstetricians/gynecologists, and orthopedic surgeons) that are experiencing a crisis. Mr. Melby submitted Exhibit 7 (Montana Physician's Medical Liability Insurance 2003: Impacts on Physicians and Patients) to support the MMA position on this issue.

Mr. Melby also distributed a memorandum that addresses the medical malpractice tort climate in Montana and points out several issues that may have contributed to the growing concern over medical malpractice insurance (Exhibit 8 - Luxan and Murfitt Memorandum).

Mr. Melby noted that much of the information this Committee needs to gather in order to study this issue would have been available to them under MCA 33-23-311, repealed in 2001 (HB504) that required carriers to file malpractice data with the state, including not only costs to hospitals and physicians, but also attorneys, CPA's, and other professionals that are involved in the process (Exhibit 9 - Neely letter). Mr. Melby asked the Committee to consider reenactment of this statute.

**Mary McCue, Executive Director, Montana Dental Association (MDA)**, said the MDA's position on this issue, from the general practitioner's point-of-view, is that there is not a crisis either in the availability or in the cost of malpractice insurance. Ms. McCue provided statistical information concerning just the general practitioners to support this position:

- There are 551 licensed dentists in Montana, 500 are members of MDA, and 424 are in active practice.
- MDA recently chose a malpractice insurance carrier that it will endorse to its membership. This carrier was chosen from a field of five companies and the quotes were very competitive. Ms. McCue gave as an example a fifty-year old general practice dentist whose yearly malpractice quotes from the five companies ranged from \$1,000 - \$1375. Based on figures such as those, the MDA does not think there is a crisis.
- Ms. McCue does not have statistical data available for oral surgeons because they are not covered under the endorsed insurance carrier and are responsible finding their own insurance and asked Rep. Roberts if he had access to this information.

Ms. McCue also provided data on malpractice claims against dentists.

- There is an average of seven to eight claim filed per year against dentists.
- In 2001, there were nine claims filed.
- In 2002, there were seven claims filed.
- There was a total of 81 claims filed against dentists from 1977-2000. Of those claims, only nine resulted in law suits, and four of those went on the appeal stage.

Rep. Golie submitted materials from **Rose Hughes, Executive Director, Montana Health Care Association (MHCA)**, stating that the MHCA does think there is a crisis in both the cost and the availability of medical liability insurance. Ms. Hughes provided a packet of information to support this position (Exhibit 10).

Sen. Cromley asked Mr. Brown if the carriers that are discontinuing liability insurance are discontinuing coverage just in Montana or on a nationwide basis. Mr. Brown referred Sen. Cromley to Exhibit 5, page 5, and said of the six carriers leaving Montana, only OHIC was still offering national coverage.

Sen. Grimes asked Mr. Brown if it was his opinion that this was an cyclical problem, as was seen in the 1970's and 80's. Mr. Brown answered that the stock market has had a huge impact on the insurance companies because their reserves have been so drastically reduced by the poor market and that rebounding will be more difficult than in the past because the economy is not improving very quickly. Mr. Brown said at a recent MHA annual meeting, there were predictions of increases ranging from 25-60 % over the next the next five years and that he did not anticipate the problem going away.

Sen. Grimes asked Mr. Brown if the structure of a healthcare facility could have an impact on the rates being charged. Mr. Brown said it has been difficult to gather that type of information in the past so there is a lack of general information specific to Montana hospitals. He said this information would be very informative and useful in identifying the changes in facility structures and how these changes may have affected the amount of premiums paid. Mr. Brown said this information would also help to determine if the changes occurring were from within the industry or from outside the industry.

Sen. Grimes asked Mr. Brown if he was willing to assist in conducting a survey of the MHA members to determine the cause of the changes in insurance rates. Mr. Brown said he would conduct the member survey.

Rep. Galvin-Halcro asked if the growth of surgical centers in urban areas has impacted hospital insurance premiums due to physicians leaving the hospital setting and moving to surgical centers. Mr. Brown said if the most difficult surgeries are done at only at the hospitals and not at the surgical centers then that does increase the risk factors for the hospitals. If the surgery caseload is evenly distributed between the surgery centers and the hospitals then there should not be a great impact.

Rep. Galvin-Halcro referred to Exhibit 7 and asked Mr. Melby if his statement, "physicians are locked into companies" meant they don't have the ability to go out and shop for a better insurance rate from another company. Mr. Melby clarified that he meant that figuratively and that physicians are free to shop for liability coverage. He also said a new company may require the doctor to purchase a "tail" based on past claims filed while with the previous insurer and that the "tail" may be four times the amount of a year's premium, thus making it very expensive to change insurers.

Sen Cobb asked Mr. Melby if physicians have a "rule of thumb" guideline they use to set a specific percentage of their operating budget aside for liability insurance premium costs and if he could give an approximation of what that percentage was. Mr. Melby said he was not aware of such a guideline and did not have information available on what percentage of operating costs insurance premiums made up.

Sen. Cobb asked the same of Mr. Brown concerning health care facilities. Mr. Brown said insurance carriers use many rating factors to determine the cost of premiums. He also said each facility is rated individually on the depth and breadth of covered services, amount of the deductible, and level of coverage, so costs between facilities vary greatly. Mr. Brown estimated, that for a larger facility, 2-3% of the budget would be spent for liability insurance premiums.

Rep. Roberts asked if smaller hospitals have been able to absorb these increases and stay profitable. Mr. Brown said the smaller hospitals are operating on a negative profit margin.

Sen. Grimes stated that in listening to the information presented to the Committee members, it was his sense that there is a crisis in affordability and asked how much more in premium increases hospitals can withstand before facilities start closing their doors. Mr. Brown agreed there is a crisis and said even with cutbacks in staff, equipment, and services, facilities cannot keep up with the costs. He also made the point that only so many cutbacks can be made before the quality of care is impacted and that issue is of the utmost concern to facilities. Mr. Brown said MHA has yet to identify the reason that premiums are going up so drastically and that makes it very difficult to do anything to address the problem.

Rep. Golie asked if the facilities and practitioners have asked the insurance companies why the premiums are so high. Mr. Brown said they do ask and the typical response is that Montana has an environment conducive to lawsuits and a history of generous settlements. Mr. Brown said he doubted this was the case because the statistics in Montana do not support it. He said in his opinion, factors from out-of-state are more of an influence and that the issue is industry-wide.

Sen. Cobb asked what the premium rate increase would be for facilities that insure themselves through captive insurance. Mr. Melby answered there would be an approximate 10% increase over their current premium rate, while if the same group was insured through a traditional carrier, they would likely see a 25-30% increase in their premium rate.

Mr. Melby asked to correct a statement he made earlier to Rep. Galvin-Halcro and said if a physician changes carriers but from a "claims made" policy to a "claims made" policy with another carrier, a "tail" is not needed. Other changes in the policy or status of the physician may require the purchase of the "tail" but as long as the physician maintains a "claims made" policy from one carrier to another, purchasing a "tail" is not required.

Rep. Roberts said one of the reasons a physician may stay with one carrier is because if the physician has been with a carrier for a length of time and then retires, the carrier will pick up the claims made after retirement and the "tail" is taken care of by the carrier. If there is a switch, the "tail" must be purchased by the physician. Mr. Melby said he would research this topic further and report his findings to the Committee.

## **LIABILITY INSURANCE PROVIDERS**

**Mona Jamison, The Doctor's Company of California**, testified to the Committee that:

- The Doctor's Company is based in California, is physician owned and operated, and insures only physicians;
- the passage of HB 309 in 1995 (provided caps for economic damages allowed in settlements) has stabilized insurance rates for Montana physicians and therefore, the Doctor's Company does not think there is a crisis in liability insurance for physicians;
- it was her understanding that the original focus of SJR 32 was intended to be hospital liability issues and not physician focused and urged the Committee to maintain the original focus;

- she found it interesting that there was not a single insurance carrier that insured facilities in attendance at the meeting and suggested the Committee ask them to attend a future meeting so the Committee could ask them why they make the decision to discontinue offering coverage;
- nationally, more and more facilities are employing physicians so not only does the hospital have liability issues, but they may now also be held liable for the employed physician;
- it is critical to identify the changes in employment patterns in Montana and surrounding states and then compare the increases in the hospital rates;
- the Montana Supreme Court ruling on "ostensible agency" (2001, Case # 312, Butler v. Domin) could be very relevant in this issue because this case imposed liability for negligence on the hospital where the physician was providing services.

In summary, Ms. Jamison said as far as the Doctor's Company is concerned, there is no crisis in physician liability insurance and she identified three areas for investigation:

- study the number of Montana hospital employees in comparison to national numbers;
- ask the insurance carriers who have discontinued coverage in Montana why that decision was made, and
- investigate if the Supreme Court ruling on "ostensible agency" is a factor in this issue.

Rep. Roberts asked if the physicians insured by the Doctor's Company who are practicing in speciality fields pay higher premiums than other physicians. Ms. Jamison said that was true but that the Doctor's Company rates were still substantially lower than other companies.

Sen. Grimes asked Ms. Jamison if the Doctor's Company insured a physician that was attached to a facility as an employee. Ms. Jamison said, from the Doctor's Company perspective, such a doctor was a hospital employee and not eligible for coverage by the Doctor's Company. Sen. Grimes asked Ms. Jamison to find out from her principal what the increased risks would be if the physician was associated with a facility. Ms. Jamison said she would gather that information to the extent it was available to her.

Ms. Jamison said another volatile area nationally is nursing home litigation. She said it is growing rapidly, that many hospitals own nursing homes, and said the litigation affects rates for Montana hospitals that own and operate nursing homes.

Sen. Cromley asked if the national trend of facilities employing physicians was present in Montana. Ms. Jamison said she believed that was true.

**Jacqueline Lenmark, American Insurance Association (AIA)**, presented testimony to the Committee and stated the AIA does not identify Montana as a medical malpractice liability crisis state at this time but agreed there are some specific specialty physicians and facilities that are experiencing a crisis.

Ms. Lenmark said she anticipated the Committee would hear that insurance premiums are rising due to stock market investments and referred to MCA statutes 33-12-101 and 33-12-301, which

regulate how insurance companies assets may be invested. She said medical liability insurers are very conservative investors:

- in 2001, stock market investments for these insurers comprised only 9% of the entire industry's portfolio,
- approximately 85% of assets of medical liability insurers are invested in bonds, and
- these investments are heavily regulated to maintain the solvency of the company.

Ms. Lenmark said the Insurance Commissioner has the authority to review rates and premiums and if the rates are determined to be excessive or discriminatory, the Commissioner has the authority to disapprove the rate and to ask the insurer to refile a more appropriate rate. Ms. Lenmark said this authority is key to this issue.

Ms. Lenmark said the reason malpractice insurance exists is because medical negligence does occur, that liability insurance is a "purchased defense" for providers, and made the point that defending a negligence claim is very expensive regardless of the outcome.

Ms. Lenmark said she would provide further premium information to the Committee as soon as she received it and offered the support and resources of the AIA.

Rep. Brown asked Ms. Lenmark if it was possible to get a statement from the insurance companies that have left Montana as to why they left. Ms. Lenmark said she has been attempting to get that information and would continue to work on that.

Rep. Brown asked Ms. Lenmark if it was her opinion that the Supreme Court decision on "ostensible agency" has caused insurance premiums to go up in Montana and if there was any way to quantify it. Ms. Lenmark said the civil justice system was an extremely important component of any insurer's evaluation of whether to enter the Montana insurance market. Ms. Lenmark said she was not familiar with that particular case but that she would inquire about it.

Rep. Golie asked Ms. Lenmark if a big component of the large rate increases being experienced by the specialty practices was due to the past history of a doctor or hospital. Ms. Lenmark said she did not mean to say that the increases were very large because Montana data shows that the rates for physicians have remained stable and the increases have been lower than the national averages. She said the extraordinary increases she referred to were those mentioned in testimony given in the legislative hearings about this bill. She said that in general, the experience of the physician for a particular type of practice is important but is not the only factor and that the risks the physicians are exposed to are also important.

## **LIABILITY AND THE LEGAL PROFESSION**

### **Patients as Plaintiffs -- Al Smith, Esquire, Montana Trial Lawyers Association (MTLA)**

testified to the Committee on behalf of the MTLA and made the following points (Exhibit 11):

- From a long term point-of-view, there is not a crisis in liability insurance but from a short term perspective, there is evidence to support the argument.
- There is no information on the severity of the crisis and the whole picture must be examined before a determination can be made.

- The cyclical nature of the insurance market must be tied in to the study when making the determination of whether or not there is a crisis.
- Insurance reform is the only way to keep premium rates in check.
- The surest way to decrease liability rates is to decrease the incidence of negligent medical errors and suggested the Committee investigate what steps could be taken to improve patient safety.
- The legislature should not further limit victim's awards or attorney fees as a solution to the liability insurance issue.

**Facilities and Providers and Defendants -- Larry Riley, Esquire, Montana Defense Trial Lawyers Association (MDTLA)**, said not only is there a medical malpractice insurance crisis in Montana, but nationally as well. Mr. Riley said the exodus of insurance carriers from the Montana market and skyrocketing rates are strong indicators that there is something wrong with the system. Mr. Riley also distributed a packet containing three articles for the Committee's consideration addressing different aspects of the liability problem (Exhibit 12):

- *A New Crisis for the Med Mal Market?* by James Hurley,
- *Medical Malpractice Insurance: A Market In Transition* by Karl, and Atkinsky,
- *Medical Malpractice Insurance* published by the Insurance Information Institute.

Rep. Roberts asked if problems caused by a minority of practitioners were impacting the majority. Mr. Riley answered said there was no question that incompetent or impaired practitioners have had an impact but that the problem was multi-faceted. Mr. Riley said that modern medicine is very complex and complicated by the fact that physicians are saving patients today that were not considered "savable" just a few years ago. These difficult cases often have catastrophic outcomes, are extremely expensive to treat, and doctors are becoming increasingly more hesitant to administer care. Many doctors now refer these types of patients elsewhere, rather than treat them, due to the potential risk.

Rep. Roberts asked if hospitals were becoming more hesitant to administer emergency care. Mr. Riley said he believed that to be the case.

Sen. Grimes asked if the number of claims filed have risen. Mr. Riley said the number of claims have not risen, but the severity of claims has risen.

Rep. Roberts said the current median jury award was approximately \$3.5 million and asked if that kind of award was occurring in Montana. Mr. Riley said awards of that size have been seen in Montana and they are due to the high cost of hospitalization.

**Attorneys at large -- Chris Manos, Executive Director, Montana Bar Association (MBA)**, said members of the MBA were of varying opinion as to whether there was a liability insurance crisis in Montana. Mr. Manos distributed several handouts to provide educational information on the MBA and other relevant information on the issues of malpractice insurance and litigation:

- Current Judicial Regulation of the State Bar Provides Public and Attorney Services (Exhibit 13),
- A Primer on Keller v. State Bar of California, 496 U.S. 1 (1990) and its Progeny (Exhibit 14),
- MEDICAL MALPRACTICE: Implications of Rising Premiums on Access to Health Care, GAO Report to Congressional Requesters (Exhibit 15), and

- An Open Letter to the U.S. Chamber of Commerce (Exhibit 16).

Sen. Grimes asked Mr. Riley, as a representative of the hospitals, what he would most like the Committee to focus on. Mr. Riley suggested several areas for study:

- California legislation (MICRA) that has successfully addressed the medical liability crisis in that state,
- the California insurance reform legislation (Prop 103, 1985) passed in addition to the MICRA legislation, and
- the overall history of the California situation to see how it compares to what is happening in Montana.

## **OTHER STAKEHOLDERS IN MEDICAL MALPRACTICE LIABILITY INSURANCE**

**Tom Ebzery, representative for St. Vincent's Hospital, Holy Rosary Hospital, and St. James Hospital,** said he agreed with Mr. Riley that there is a crisis, presented premium data to substantiate his claim, and made several suggestions to the Committee:

- The liability premiums for the three hospitals he represents has increased ten-fold over the last three years and gave the specific example of St. Vincent's Hospital in Billings, Montana which has experienced an increase from \$350,000 to \$3.5 million in their annual premiums over the past three years.
- The specialty practices are experiencing extreme rate increases.
- The Committee should examine the insurance reforms put in place in Texas and California.
- The Committee should, as was discussed in the last legislative session, consider implementing "expert witness" standards and examine their effect on the outcome of malpractice suits.

Mr. Ebzery offered his support to the Committee and said he would assist them in whatever capacity needed to study this problem.

Rep. Grimes asked if the hospitals would be willing to participate in a study to gather detailed information on how the hospitals are structured, how that has affected their rates, and any feedback they may have gotten back from their underwriter. Mr. Ebzery said the hospitals would participate.

**Jani McCall, representative for Deaconess Billings Clinic (DBC), Billings, Montana,** submitted a letter to the Committee from Kathy Kenyon, J.D., General Counsel, stating there is a crisis in medical malpractice liability insurance. The letter also listed suggested areas for study and reform (Exhibit 17). Ms. McCall asked the Committee to consider holding a meeting in Billings to allow both facilities and practitioners in eastern Montana an opportunity to voice their opinions and concerns.

## **COMMITTEE DISCUSSION AND DIRECTION**

Mr. Bohyer referred the Committee members to the Proposed Study Outline for SJR 32 (Exhibit 18) and reviewed the following:

- SJR 32 History and Issues:
  - was crafted and introduced during the 2003 Regular Session to address a problem that perceived to be emerging in Montana: rising liability insurance premium costs and declining availability of liability insurance,
  - ranked first among 13 requests for interim studies, and
  - Legislative Council created a subcommittee composed of four Legislative Council members and four members appointed by the Council Chair to study the issue.
- Direction from the Legislature concerning liability insurance:
  - reviewing measures adopted by other states to address this issue,
  - identifying strategies for increasing availability,
  - identifying factors affecting the cost ,
  - examining strategies for resolving liability claims outside of the court system, and
  - developing specific options for consideration by the 59th Legislature.
- the Proposed Study Design:
  - Phase 1: Building a foundation of facts and evidence regarding the liability issue,
  - Phase 2: Narrowing the focus to identify and analyze the specific factors believed to be influencing premiums increases and availability,
  - Phase 3: Findings and conclusions about the causes of liability premium increases and availability in Montana and what effect liability premiums and availability may have with respect to healthcare and the welfare of Montanans, and
  - Phase 4: Legislative options for addressing the causes of the premium increases and availability of affordable liability insurance in Montana.

Mr. Bohyer then reviewed the work completion timeline and tentative agendas outlined in the study plan, suggested the Subcommittee schedule its meetings to coincide with Legislative Council meetings, and reminded the Committee that its work must be completed by September 15, 2004.

Rep. Roberts said preservation of the small hospitals in Montana should be the number one priority of the Committee in conducting this study.

Rep. Golie asked what information needed to be identified for consideration at the next meeting that was not available at today's meeting. Sen. Grimes said not only did the Committee need to identify what information was needed, but also how to get it before the next meeting so Committee members would be ready to discuss it.

Sen. Cobb asked if the Committee had officially decided there was a crisis in the cost and availability of medical malpractice insurance.

Sen. Grimes said it was his intention to gather enough information to make that determination at the next meeting.

Sen. Grimes **moved** to adopt the proposed study outline, with the caveat that if new information was discovered and decided to be relevant, it could be included in the study plan as well. The proposed study plan **passed unanimously** on a voice vote.

Sen. Grimes asked Mr. Brown of the Montana Hospital Association to design a draft survey of hospitals to determine exactly why the rates have gone up within the hospitals. He asked for the following information to be included on the survey

- the structure of the hospital,
- how the structure might have affected its liability,
- what information the hospital is getting from its underwriter, and
- anything from the discussion today that would help identify the nature of the problem and to identify differences among the hospitals.

Sen. Cobb said he would like to know what the facilities' percentage of premiums paid is compared to their total operating cost and if that has changed dramatically.

Sen. Shea said she would like to know who is picking up the majority of the costs: the hospital or the patient.

Rep. Brown said he would like information from facilities to determine if they are increasing their deductibles or decreasing coverage, in order to save on costs.

Sen. Cobb asked to include any information on lawsuits, claims filed, or any other data that could be legally shared.

Sen. Cromley said he could not see why there was such a disparity of premium increases between facilities and providers and asked the insurers to provide information to explain that.

Sen. Grimes said another survey was needed to gauge what the litigious atmosphere is for hospitals and providers and suggested asking the defense attorneys to provide information on if there have been changes in the numbers of claims and settlements.

Mr. Bohyer said the Montana Medical Legal Panel hears each medical malpractice claim before it is allowed to go court so that information is available, but settlements that do not go to court are closed files and unavailable to the public. Mr. Bohyer said perhaps the Montana Bar Association could poll its members to determine if, over a period of time, any changes in the numbers of medical malpractice cases that they participated in, either as plaintiffs or defense council.

Sen. Cobb said the MHA or captive insurance groups should have generic information to give to the Committee: in order to get insured, they have to know how many claims have been filed and how they have been settled. Sen. Cobb said they wouldn't have to divulge confidential information to share these generic numbers with the Committee.

Mr. Bohyer said he would research this and gather whatever information that was available.

Sen. Shea said she would like clarification from Ms. Jamison on why there is such cost disparity of insurance premiums between providers and facilities and between providers themselves. Ms. Jamison said it was because the rates between the insurance carriers still doing business in Montana vary greatly.

Rep. Brown suggested having testimony from physicians practicing in specialty fields at the next meeting and said holding a meeting in Billings would allow not only the specialists to give input, but would allow the many rural hospitals in eastern Montana to participate as well.

Mr. Bohyer asked the Committee to look at the table on page 11 of Mr. Melby's handout (Exhibit 7). Mr. Bohyer pointed out that there have been uniform rate decreases in 2003 for all Montana specialty practice categories insured by the Doctor's Company of California, which insures 500 doctors in Montana. Mr. Bohyer asked if the information the Committee was looking for was a comparison of what they paid for premiums last year and what they paid this year.

**Brian Zins, Montana Medical Association (MMA)**, directed the Committee to page 13 of Exhibit 7 which compares premium rates for The Doctor's Company and Utah Medical Insurance Association and asked the members to note the large differences in the rates for the practice categories. Mr. Zins said the MMA thinks there is a liability insurance crisis for physicians.

Sen. Grimes asked Mr. Zins what kind of information the Committee should pursue to find the answer to this issue. Mr. Zins said the Committee needs to find out from the concerned physicians what they are currently paying for premiums as opposed to what they paid last year and perhaps the previous few years. He also suggested the Committee ask the insurance companies why they have raised their rates so dramatically.

Mr. Bohyer said there was no one definitive answer because the entities involved would all have differing opinions as to the cause and because this is such a complex issue, none of the answers could be considered "the" answer. Mr. Bohyer said the Committee must find a way to relate all of the information gathered to a public policy decision that this Committee can deal with.

Rep. Roberts suggested sending a form letter to the major specialty practices in the state asking them to describe what premium rate increases or cost of operation increases they have experienced and have them mail the form back to the Committee.

Mr. Bohyer said the information needs to cover at least a 10-year period of time so the Committee could factor in the effects of the tort reforms that were enacted in 1995.

Rep. Golie asked the Committee to decide which specialty practices should be included in the survey. After discussion, the Committee chose the following specialties to be included in the survey group:

- Orthopedic surgeons,
- Urologists,
- Ob/Gyns,
- Cardiologists,
- Oral surgeons, and
- Neurosurgeons.

Mr. Bohyer said the letter must ask the physicians to specify if their insurance policy covers them individually or if they are part of a group policy; and how or if the number of physicians insured has changed over the years because this factor influences the amount of premium paid.

Rep. Golie asked Mr. Zins if he would oversee sending the letter and gathering the responses. Mr. Zins said he would be happy to do that for the Committee and would begin immediately. Mr. Zins asked the Committee to clarify for him the exact information requests and questions they wished to have included in the survey letter. The Committee instructed Mr. Zins to include the following requests for information and questions:

- amount of premiums paid for each year by the individual physician over a 10-year time period,
- the percentage of their premium costs as compared to their total operating costs, and
- who is paying the premiums - is physician self-insured or insured through a group or a facility.

Sen. Cromley asked if by gathering information from individual physicians, the Committee was going beyond the scope of SJR 32. Mr. Bohyer said all of the "whereas" clauses of the study are directed towards facilities except for the last one which reads, "and healthcare providers associated with healthcare facilities". Mr. Bohyer said it was not clear what the exact intent of this language was but he thought physician information could be included under that particular clause.

Sen. Grimes said in the legislative hearings on SJR 32, it was his understanding that the study was meant to include facilities and the doctors insured directly through those facilities whose rates are going up because their association with facilities.

Rep. Roberts suggested asking physicians if the change in the malpractice environment has changed the way they practice medicine and if so, how has it changed your practice methodology.

Rep. Golie asked Mr. Zins if a neurosurgeon working for a hospital, for example, paid for his own malpractice insurance premiums, it is taken care of through the facility that employs him? Mr. Zins said it could be considered part of his contract but did not know how to answer that and said the neurosurgeon could experience a cost to that facility if the facility is paying the premiums. Rep. Golie asked if a neurosurgeon gets paid "x" amount of dollars, year to year and if the rate of premium goes up to insure him while he works for that hospital, does that have an impact on that neurosurgeon. Mr. Zins said he thought it could impact the physician and that they could ask that. But initially, if he was covered by himself and subsequently, when he became employed by the facility, the facility would pick up the premium and we can find out what that is and who paid it.

Sen. Grimes suggested that Mr. Bohyer review and suggest changes to a draft survey to allow the survey process to move ahead on a timely basis. Mr. Bohyer said the Committee still needed to clarify how the information that was being assembled would be implemented through public policy changes.

Sen. Grimes said the Committee needs information from the insurers that have left the state to determine why they left. Rep. Golie asked Ms. Lenmark to gather this information for the Committee. Ms. Lenmark said she would get as much information as possible from the insurers who have withdrawn from the Montana market and asked for a specific list of companies to contact. Mr. Brown said he would provide the list of insurers to Ms. Lenmark. Ms. Lenmark said she has ordered premium information for the Committee to give a broad picture of what has

happened with premiums, she has aggregate loss ratio information, and has started a data base on verdicts and settlements to the extent that settlement information is available.

Sen. Cobb asked why MCA 33-23-311 was repealed in the 2001 legislature. Mr. Bohyer said he would ask the Code Commissioner, Mr. Greg Petesch, to answer this question for the Committee.

Rep. Golie asked for discussion regarding holding the next SJR 32 Subcommittee meeting in Billings. Rep. Brown spoke in support that proposal, pending approval by the full Legislative Council. Sen. Shea said she supported the idea as well but asked to be certain the cost of moving the meeting to Billings would be reasonable.

Rep. Brown **moved** to hold both the next SJR 32 Subcommittee and Legislative Council meeting in Billings, Montana, in November, 2003; pending cost analysis. The motion passed on a 6-2 voice vote, with Sen. Cromley and Rep. Galvin-Halcro voting no.

Sen. Grimes said he wanted to be clear that the surveys be crafted and completed before the next meeting date so the Committee would have the information. Mr. Bohyer said that was his understanding and would work with the MHA, the MMA/MMLP, and the MBA.

Rep. Roberts nominated Sen. Grimes for vice chair. Sen. Grimes was unanimously elected on a voice vote.

#### **ADJOURNMENT**

With no further business, the meeting was adjourned.

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